Supreme Court of the United States

OCTOBER TERM, 1940.

No. .....

O/Y WIPU, as owner of the Finnish steamer WILJA,

Petitioner,

against

LOUIS LOUIS DREYFUS, JEAN LOUIS DREYFUS, PIERRE LOUIS DREYFUS and FRANCOIS LOUIS DREYFUS, co-partners, doing business under the firm name and style of LOUIS DREYFUS & Co.,

Respondents.

BRIEF IN SUPPORT OF PETITION OF O/Y WIPU FOR WRIT OF CERTIORARI.

I

The Opinions Below.

The opinions of the District Court (R. pp. 77-79, 85-86) were filed on January 26 and February 7, 1940, respectively, and are reported together at 32 Fed. Supp. 247.

The opinion of the Circuit Court of Appeals (printed R. pp. 143-147) was filed on July 18, 1940, and is not yet reported.

The case came before the Court on a motion to decline jurisdiction, supported and opposed by affidavits. The mate-

rial facts were not controverted and are set out in the Court's opinion, and no findings of fact or conclusions of law were required.

II

Jurisdiction.

The date of the judgment entered herein by the United States Circuit Court of Appeals for the Second Circuit, reversing the decision of the District Court, is August 6, 1940 (R. p. 147).

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 938; U. S. Code, Title 28, Section 347.

III

Statement of the Case.

The facts are sufficiently stated in the petition, *supra,* at pages 1 to 5.

There are two questions for decision:

(a) Whether the Circuit Court of Appeals was justified in reversing the decree of the District Court in a case in which admittedly (R. p. 147) the question of whether to retain or decline jurisdiction was one for the sound discretion of the District Court and where the Circuit Court of Appeals has not found, as a matter of law, that the discretion of the District Court has been abused; and

(b) Whether, when the parties to a contract of charter-party have contracted that all disputes arising out of the contract shall be referred to arbitration, the arbitration clause becomes null and void with respect to matters arising

while the charter-party was in full force and effect, simply because at a subsequent time the shipowner (rightly or wrongly) declines to make further performance of the charter-party on the ground that it has been frustrated.

IV

Specifications of Error.

The Court of Appeals erred (1) in interfering with the sound discretion of the District Judge with respect to matters as to which his discretion, and not theirs, must control; and (2) in holding the arbitration clause of the contract in suit null and void.

V

Argument.

POINT I

It was within the power of the District Court in the exercise of its sound discretion to decline jurisdiction of respondents' suit.

In *Canada Malting Co., Ltd.* v. *Patterson Steamships, Ltd.*, 285 U. S. 413, 76 L. Ed. 837, this Court said (p. 418):

> "The libelants concede, as they must, that in a suit in admiralty between foreigners it is ordinarily within the discretion of the District Court to refuse to retain jurisdiction; and that the exercise of its discretion will not be disturbed unless abused."

The Court further said (p. 421):

> "The rule recognizing an *unqualified* discretion to decline jurisdiction in suits in admiralty between foreigners appears to be supported by an unbroken line of decisions in the lower Federal Courts." (Italics ours.)

In *U. S. Merchants & Shippers Ins. Co.* v. *A/S Den Norske Africa og Australie Linie* (*The Tricolor*), 65 F. (2d) 392 (C. C. A. 2d), the Court said (p. 392):

> "Both sides concede that had the Dutch shipper itself moved in the suit, jurisdiction would have depended upon the discretion of the Court; each party would have been an alien, and the District Court is not obliged to try such cases; its jurisdiction depends upon whether its exercise is essential to justice; whether the libelant is driven to seek it in order to secure any adequate redress at all."

In the *Tricolor* case the cargo was shipped from Norway and Germany to China, the cargo owner being Dutch and the shipowner Norwegian.

See too:

Goldman v. *Furness, Withy & Co.* (S. D. N. Y.), 101 Fed. 467.

Malcomess & Co., Ltd. v. *SS. New Texas and Elder Dempster & Co., Ltd.* (E. D. N. Y.), 1926 A. M. C. 1514 (not elsewhere reported).

The Lady Drake (E. D. N. Y.), 1 Fed. Supp. 317.

The same doctrine has been consistently followed by the courts in countless other decisions, the majority of which are assembled in the footnote to the decision in the *Canada Malting Co., Ltd.*, case, *supra.*

The point of all of the decisions is, of course, that the primary purpose of United States courts is to determine issues between our own citizens, and that while in exceptional cases the Court may in the interests of comity be willing to take up its time with controversies between foreigners, with consequent loss of time available to it in disposing of issues rightfully before it, it should do so only in cases where otherwise the libelant will be deprived of any relief.

In *Cuba Railroad Co.* v. *Crosby,* 222 U. S. 473, 56 L. Ed. 274, Mr. Justice Holmes said (p. 480):

> "But it should be remembered that parties do not enter into civil relations in foreign jurisdictions in reliance upon our courts. They could not complain if our courts refused to meddle with their affairs and remitted them to the place that established and would enforce their rights."

POINT II

The District Court, having in the exercise of its discretion declined jurisdiction of the suit, was not subject to reversal by the Circuit Court of Appeals.

It is well settled that the Circuit Court of Appeals is without authority *to substitute its discretion* for the discretion of the District Court. Even though that Court might be of the opinion that had it been sitting as a District Court it might have retained jurisdiction of this cause, it may not reverse the District Court's decision on that ground alone. This rule was restated by Mr. Justice Stone in the comparatively recent case of *Charter Shipping Co.* v. *Bowring, Jones & Tidy,* 281 U. S. 515, 74 L. Ed. 1008, where he said (pp. 518-519):

> "* * * it was for the district court to say, as it did, upon a consideration of all the circumstances, whether it should decline 'to take cognizance of the case if justice would be done as well by remitting the parties to the home forum.' * * *
>
> It was for the District Judge to consider the facts appearing and the inferences which he might draw from them, and reach his own conclusion as to the convenience of witnesses, as well as the other factors upon which he decided that justice would be best served by leaving the parties to their suit in England."

POINT III

There has been no abuse of discretion in this case.

The respondents in their affidavits, their assignments of error and their briefs advanced a great number of sophisms in an endeavor to mislead the Circuit Court into believing the District Court's refusal to entertain jurisdiction constituted an abuse of its discretion. Respondents' principal argument was devoted to an attempt to establish that the controversy is one involving American interests. They claimed, for example, that the contract was one made by "Louis Dreyfus & Co. *of New York,*" citing as their authority certain words in the printed charter form (Exhibit A, R. p. 28), which printed form recites that the charter is "between Antti Wihuri, managing owner of the steamship *Wilja* * * * and Messrs. Louis Dreyfus & Co. of New York, charterers." There is, of course, no such concern as "Louis Dreyfus & Co. of New York," or if there is, it is not suing here. Louis Dreyfus & Co. is a co-partnership, all of whose partners are citizens (R. p. 61) and residents (R. p. 52) of the Republic of France. The fact that a part of the cargo which the libelants intended to ship from Montreal on the *Wilja* may have been "American grain" is of no significance. The mere fact that a part of the grain may have been grown somewhere in the United States and shipped via the Great Lakes to Montreal does not convert a French partnership into a New York concern; it would be extraordinary if the character of a contract entered into at London between French and Finnish companies could be made to acquire New York attributes simply because part of the cargo intended to be delivered to the ship at Montreal had been grown in our Western wheat fields.

Further, although the printed form which was made the basis of the charter-party contains the words "Louis Dreyfus & Co. of New York," the major portion of the contract is

contained in a typewritten rider (also reproduced at page 28 of the Record) which reads in part:

> "15. Owner to declare laydays and cancelling dates to Louis Dreyfus & Co., London, as soon as he is in a position to do so. On receipt of such declaration, Messrs. Louis Dreyfus & Co., London, to declare whether they will execute or cancel this charter party."

The typewritten clause is, of course, entitled to much more weight than any printed form, and in it respondents are referred to as Louis Dreyfus & Co., London. It is submitted that there is more significance in the addition of the word "London" in typewriting than there is in the addition of the words "New York" in print.

See: *Dexter & Carpenter, v. U. S.*, 13 F. (2d) 498, 500.

The respondents made a great deal of the fact that the testimony of the *Wilja's* officers could have been taken at New York. If the fact that the crew of a vessel is available at the port where she is libeled were of controlling importance, courts would never decline jurisdiction. Obviously the *Wilja* would not lie idle in New York until the case might be reached for trial. She was bound to be bonded, if possible; and, indeed, at the time when the matter was argued, she had been bonded, and was about to proceed on her business. There was no more reason to suppose that the ship's officers would be available at New York when the case came on for trial than that they might be available, or at least their testimony available, in proceedings in Finland or London. Their affidavits could, of course, be used on an arbitration in London and their testimony by deposition could be taken anywhere for use abroad. As Judge Campbell said in *The Lady Drake, supra:*

> "None of the real parties in interest are in New York and the Canadian witnesses as well as the wit-

> nesses aboard a Canadian Vessel, in a Canadian case, may well be produced before a Canadian court, or their depositions taken, and in so doing no unnecessary inconvenience will be caused" (1 Fed. Supp., at p. 319).

In the last analysis, whether the petitioner will be held to have breached its charter-party with the libelants will depend upon the determination of the questions (1) whether the *Wilja* was seaworthy, (2) whether due diligence was exercised to make her so, and (3) the time from which these obligations speak. Consequently, it is unquestionably true (a) that to support petitioner's case it will be desirable—and, indeed, necessary—to obtain the testimony of some, at least, of the ship's officers with respect to conditions aboard the vessel and (b) that the petitioner's case may be seriously prejudiced if, when the matter comes on for determination on the merits, it fails to produce such testimony. This, however, patently does not concern the respondents. The speciousness of their solicitude of petitioner's welfare in this connection is obvious from the fact that, if the latter is unable to obtain this testimony, the respondents will be just that much better off.

Respondents urged their need for the testimony of shipyard employees at New York with respect to the repairs made to the circulating pump and cylinder cover during the vessel's prolonged layup at the Brooklyn Shipyard following her breakdown at sea en route to Montreal on November 21st, which repairs were not completed prior to December 27th. However, as is pointed out in Mr. Statt's affidavit (R. p. 34), the testimony of shipyard employees at New York as to conditions found after the breakdown will be insignificant compared with the testimony of the shipowner's representatives, surveyors and shipyard people at Gothenburg where the vessel underwent her special classification survey shortly before her breakdown at sea. Testimony as to what transpired during the classification survey will be of the utmost importance. Obviously, all of this testimony

will be as readily available for use in Finland or in London as in New York. Indeed, there should be little difficulty in obtaining the personal attendance of at least some of these witnesses at a trial in Finland or on a London arbitration; on the other hand, the expense of bringing them to New York would be prohibitive.

A third class of necessary testimony relates to the making of the charter-party. There was no binding agreement whatsoever between the parties until the owner declared laydays and cancelling dates to Louis Dreyfus & Co., London, pursuant to clause 15 of the charter-party (see R. pp. 35-36). Until that time the contract was no more than an "illusory" one.* The owner, as was his right, declared laydays and cancelling dates only as part of the addendum which was entered into at London as a result of the settlement of November 18th (Exhibit B, R. p. 29). Respondents argue that no testimony would be required at London because it has been stipulated that the addendum (Exhibit B) was signed by and with the authority of petitioner (R. p. 71). On the contrary, testimony as to the agreement entered into at London on November 18th is of the utmost importance, in view of the allegations of the amended libel (Article Eighth, R. p. 24) to the effect that the agreement entered into at London on November 18th contained terms which are not set forth in the addendum (Exhibit B).

---

* In view of the fact that a binding contract was entered into on November 18, 1939, which incorporated the terms of the purported agreement of August 17, 1939, we shall not burden the Court with a discussion of the cases supporting the undeniable fact that prior to the execution of the addendum of November 18th there was no binding agreement between the parties since the alleged agreement of August 17th was merely an illusory contract: See: *Williston on Contracts,* Vol. 1, Sec. 43, p. 126; *Strobe* v. *Netherland Co., Inc.,* 245 App. Div. 573, 577-578; *Metro-Goldwyn-Mayer Distributing Corp.* v. *Home Theatre Co.,* 71 F. (2d) 225, 226; *Interstate Iron & Steel Co.* v. *Northwestern Bridge & Iron Co.,* 278 Fed. 50; *Ellis* v. *Dodge Bros.,* 237 Fed. 860, 867; *Edgar* v. *Hewett Grain & Provision Co. of Escanaba,* 202 N. W. 972; *Daniel Boone Coal Co.* v. *Miller,* 217 S. W. 666; *National Surety Co.* v. *City of Atlanta,* 106 S. E. 179; *Motor Car Supply Co.* v. *General Household Utilities Co.,* 80 F. (2d) 167; *Miami Coca-Cola Bottling Co.* v. *Orange Crush Co.,* 296 Fed. 693; *Velie Motor Car Co.* v. *Kopmeier Motor Car Co.,* 194 Fed. 324.

POINT IV

The respondents were not entitled to a qualified order of dismissal.

Throughout their argument in the District Court and throughout their brief in the Circuit Court of Appeals respondents complained of the failure of the District Judge to qualify the dismissal upon the agreement of petitioner, (1) to appear in and proceed with arbitration in London *and* (2) to furnish equivalent security at London.

As to the first qualification, namely, that the petitioner should agree to appear on the London arbitration, there are several answers, any one of which is sufficient: (1) *the petitioner agreed in open court so to appear and arbitrate, and several times repeated this agreement in writing;* (2) the petitioner agreed so to arbitrate in the contract sued on, and there is and can be no allegation anywhere that it has at any time declined to comply with its agreement in this respect; (3) the British Arbitration Act is amply implemented with provisions whereby if one party declines to proceed with arbitration, the other party may proceed alone and obtain a binding judgment with his nominee acting as sole arbitrator.

Respondents' complaint that the Court failed to qualify its dismissal upon the furnishing of equivalent security in London merits the same criticism.

Of all of the great number of cases of which our courts have declined jurisdiction, the respondents, prior to the entry of final decree herein, were able to find only one case in which the dismissal was conditioned upon the furnishing of security in a foreign jurisdiction. That was the case of *Canadian Malting Co., Ltd.* v. *Patterson Steamships, Ltd.* (*supra*), which is discussed and distinguished in Judge Moscowitz's opinion (R. p. 86). It is true that there Judge Hazel conditioned the dismissal of the case, pending in the Western District of New York, upon the respondent appear-

ing in Canada and filing a bond for recovery of damages there. However, the record on appeal in that case shows that respondent's counsel, in the moving papers, formally *offered* to furnish such security provided the libel was dismissed (see Record on Appeal, p. 45). It would have been extraordinary if libelant's counsel in the *Canada Malting Co.* case had not availed themselves of that offer by the inclusion of the provision in the order presented to Judge Hazel. Furtheremore, the situation in the *Canada Malting Co.* case was entirely different from the situation which prevails here, because in that case the libelants were entitled to security in Canada. In the instant case, however, the respondents have asserted, and can assert, no right *in rem*, and since the British Arbitration Act contains no provision comparable to Section 8 of the United States Arbitration Act with respect to security, the respondents are not entitled to security in the jurisdiction to which they are remitted.

The parties, each apparently being satisfied with the financial stability of the other, in effect contracted that neither would require security from the other pending arbitration. There is no reason why the respondents should be placed in a better position by their unjustified seizure of the *Wilja* at New York than they would have been had they proceeded to enforce their rights in a proper jurisdiction.

POINT V

The Circuit Court of Appeals wholly misconceived the decision of the District Court.

In its decision the Circuit Court of Appeals dealt with the question of the enforceability of the arbitration clause, just as if the situation were one in which the petitioner, over the opposition of respondents, had sought an order directing the parties to proceed to arbitration under the provisions of Section 4 of the United States Arbitration Act, or alternatively as one in which the petitioner, over the

opposition of respondents, had sought to stay the further prosecution of the cause, pending arbitration, pursuant to Section 3 of the United States Arbitration Act. No such relief was sought by petitioner, and the propriety of granting such relief was not before the District Court at the time when it declined to exercise jurisdiction. On the reargument, respondents, not petitioner, asked the District Court for a stay pending arbitration in London pursuant to Section 3 of the United States Arbitration Act, but the District Court refused to reconsider its determination to decline jurisdiction and refused respondents' request that it merely stay the suit pending such arbitration. The situation before the District Judge was one in which non-resident alien charterers were suing a non-resident alien shipowner on a charter-party involving only transportation between foreign ports. It so happened that the contract in question contained a provision for arbitration in London. The respondents, aside from their right to sue the petitioner in Finland or in London, where the libel alleged that the petitioner had its duly appointed agent (R. p. 21), or in France, respondents' domicile, or, for that matter, anywhere else in the world where respondents could obtain jurisdiction of petitioner and persuade the Court to hear their cause, had pleaded a contract containing an arbitration clause. Whether or not this clause could be *enforced* against the wishes of either party, it certainly constituted a lawful method of disposing of the issues, if the respondents sought to invoke it, and the petitioner, as has been shown, agreed to appear in and proceed with the arbitration when and if commenced by the respondents. In stating in the conclusion of his opinion that the parties were "relegated" to arbitration at London (R. p. 79), the Judge did not purport to limit the respondents to that relief. Since the petitioner was willing to arbitrate, and since the respondents apparently also required arbitration, the District Judge quite naturally assumed that if he declined to entertain the suit here, the parties would proceed to arbitrate the issues at London. *He limited his decision, however, to dismissal of*

the suit pending at New York, specifically stating that the dismissal was not on the merits (R. p. 89), *thereby in no way limiting the right of the respondents to arbitrate or litigate in other jurisdictions as they might be advised.*

POINT VI

The Circuit Court of Appeals erred in holding as matter of law that the arbitration clause in the contract sued on was null and void and had become "wholly inapplicable to the case."

At the outset it should be noted that the suit is stated to be "in a cause of contract" (R. p. 20) and that the contract upon which the suit is brought is not only pleaded *in extenso,* but is annexed to the amended libel as Exhibit A and Exhibit B (R. pp. 28-29). The contract sued on contains the arbitration clause, and there is no allegation in the pleadings that the arbitration clause is not binding upon the parties.

That it was the intention of the parties that English law should apply is obvious. The fact that a clause providing for arbitration in England is included in the contract "imports English law as the law governing the transaction" (*Vita Food Products, Inc.* v. *Unus Shipping Co.,* [1939] A. C. 277, 290), and all of the other facts in connection with the contract support this conclusion. Accordingly, if it was the contention of the respondents that because of some peculiar provision of English law the arbitration clause was null and void, they should have so pleaded.

The arbitration clause in question was in the broadest terms, providing for arbitration in London of "all disputes from time to time arising out of this contract" (R. p. 33).

The Circuit Court of Appeals held that the arbitration clause was null and void on the ground that the petitioner had "repudiated" the charter-party. It is difficult to comprehend what the Circuit Court of Appeals meant by this, in view of the undisputed facts before them. Those facts

were that on November 20, 1939, the *Wilja,* in accordance with directions of the charterer, left New York, where she happened at that time to be, and proceeded towards Montreal in ample time to make her cancelling date of November 28th; that after departing from New York, owing to an accident to her machinery, she was compelled to put back to New York for repairs; that these repairs necessarily detained the vessel at New York until December 27th; that meanwhile and prior to December 15th the Port of Montreal closed for the winter; that consequently it would have been impossible for the *Wilja* to proceed to Montreal and load the respondents' cargo before the following spring; that the shipowner declined to agree to make an entirely different voyage from New York to the Continent; that at the conclusion of the repairs, the owner chartered the vessel to another company for a voyage to the Continent; and that on that voyage and prior to February 27, 1940, the *Wilja* was sunk (R. p. 98). The vessel having been sunk during the winter, any question of a possible obligation of the shipowner to carry the respondents' cargo from Montreal to the Continent in the spring of 1940 became moot.

As stated, the arbitration clause called for arbitration of all disputes arising out of the contract, and it is difficult to conceive of disputes which more clearly arise out of the contract than those which are the subject-matter of the libel herein. It seems perfectly clear that the principal question to be decided by the arbitrators, assuming arbitration is had, is whether the admitted failure of the *Wilja* to reach Montreal before that port was closed for the winter was due to causes for which the shipowner is responsible—i. e., some unseaworthy condition of the *Wilja*—or whether it was due to some cause from the consequence of which the shipowner was excused by reason of some term, express or implied, of the contract sued on.

A possible subsidiary point is the question of whether the original voyage from Montreal to the Continent having become impossible of performance, the shipowner was obli-

gated by reason of some provision, express or implied, in the contract sued on to make a substituted voyage from New York to the Continent.

Both of these questions arise out of the contract and, it is submitted, are precisely the type of questions which the parties contemplated should be submitted to arbitration rather than to court decision when they entered into the contract sued on.

The shipowner at no time repudiated the contract sued on. It admitted and, at the request of respondents' proctors, stipulated (R. p. 71), that the contract was duly entered into. It made no suggestion that the contract or any of its terms, were illegal or unenforceable, and at no time did it repudiate the arbitration clause of the contract. On the contrary, it repeatedly stated that it would appear in and proceed with the arbitration which the respondents declared they intended to commence at London.

The Circuit Court of Appeals referred to an alleged repudiation of the original charter-party of August 17, 1939, for supposed lack of consideration; but assuming, for the sake of argument, that the charter of August 17th had been repudiated on the ground asserted, that had nothing to do with the present controversies between the parties, because an admittedly valid contract was entered into on November 18, 1939, which specifically incorporated all of the terms and conditions of the earlier charter-party, including the arbitration clause.

The Court then seeks to find repudiation in the refusal of the petitioner to make a substituted voyage from New York to the Continent, but certainly the petitioner in taking the position that it was not obliged to make this substituted voyage by reason of the terms of the charter-party, was not repudiating the contract, but, on the contrary, was affirming and relying upon it.

The Court next spells out repudiation from the fact that some two weeks after the libel was filed, the shipowner, rather than permit his vessel, which had already lain idle for

some six weeks undergoing repairs, to lie idle until spring, had, instead, quite properly chartered her for a transatlantic voyage. It is difficult to see how this exercise of sound business judgment by the shipowner can be construed as a repudiation of the charter-party. At this time, according to the allegations of the libel, the respondents had already sustained their damage in that the respondents had "been forced and compelled to secure other transportation" at a greatly increased freight rate (R. p. 25), and since the St. Lawrence was closed for the winter, the petitioner could not deliver the vessel at Montreal. Furthermore, at this time the respondents had already commenced their suit for breach of charter. The petitioner had quite properly on December 15th notified the charterer that it considered that the charter-party had come to an end by reason of the closing of the St. Lawrence for the winter and suggested that the charterer so agree. The charterer did not so agree; on the contrary, it claimed that the charter-party was in full force and effect and commenced the suit at bar.

As the only decision of a United States court cited on this point by the Circuit Court of Appeals was *The Atlanten* (*Aktieselskabet Korn-Og Foderstof Kompagniet* v. *Rederiaktiebolaget Atlanten*) (D. C., S. D. N. Y.), 232 Fed. 403, affirmed (C. C. A. 2d) 250 Fed. 935, and 252 U. S. 313, it is appropriate that the *Atlanten* case be given consideration. The *Atlanten* was a famous test case taken to the Supreme Court of the United States prior to the passage of the United States Arbitration Act in an unsuccessful attempt to obtain a ruling that our courts had *no jurisdiction* whatsoever of a suit brought on a charter-party containing an arbitration clause enforceable under the laws governing both contracting parties, although not enforceable in the then state of the American law. In the *Atlanten* case the shipowner, *without suggesting any legal justification for his action,* had notified the charterer prior to making any attempt to proceed on the chartered voyage that he would not carry out the contract. In other words, in that case there was, in fact, what is referred

to in the opinions as a *repudiation* of the contract by the shipowner, it appearing that the owner was of the opinion, subsequently proven to be erroneous, that he could repudiate the contract and at the same time obtain the benefit of a clause in the contract describing a penalty as liquidated damages.

It is true that the District Judge stated in the course of his opinion, as was the fact, that "the withdrawal was before the voyage began, even before the ship had been delivered," but his *ratio decidendi* was that there had been a "general repudiation of the contract" by the shipowner. That this was also the reason for the decision of the Circuit Court of Appeals appears from this Court's opinion. Mr. Justice Holmes said at page 315:

> "For this case it is enough that we agree substantially with the views of Judge Learned Hand in the District Court and Judge Hough in the Circuit Court of Appeals. Their opinion was that the owner repudiated the contract and that the arbitration clause did not apply."

In the instant case the situation is entirely different and the reasoning which led to the *Atlanten* decision is wholly inapplicable.

The libel alleges that the *Wilja,* having been released from a prior writ of foreign attachment on Saturday, November 18th, sailed from New York on Monday, November 20th. She had been instructed by the respondents' New York office to proceed to Montreal to load a cargo of soya beans; she left New York for Montreal in ample time to make her canceling date of November 28th, and with every intention, so far as appears, of loading and transporting the cargo. As respondents well know, en route to Montreal the *Wilja* sustained serious machinery damage, consisting of the fracture of a high-pressure cylinder cover and the collapse of her combination air and circulating pump. Fortunately she was able to limp back to New York, where she arrived the following day; she then proceeded to the Morse plant of the

Bethlehem Steel Corporation, 57th Street, Brooklyn, where it was found that the parts in question required renewal. These renewals required the making of castings, and as a result the *Wilja* was detained at the repair yard until December 27th (R. p. 103). Petitioner thus not only lost the use of the *Wilja* for almost six weeks, but also incurred heavy expense in effecting the required repairs. Respondents argued in the District Court, and will perhaps suggest here, that for the sole purpose of escaping its contract with the respondents the petitioner wilfully endangered the lives of the crew, risked its then highly valuable vessel and deliberately caused the serious damage to the vessel's machinery and consequent loss of time. When it is realized that had it not been for the breakdown of her machinery, the *Wilja* would have been able to make the chartered trip for the respondents, earn her freight from them and still have been free to make other and more profitable contracts prior to the time when she actually was freed from the repair yard, it becomes patent that any such suggestion on the part of the respondents was mere nonsense. The reason that the *Wilja* did not carry out its contract with respondents was simply because the intervention of winter and the consequent closing of St. Lawrence River navigation made performance of the contract impossible, despite petitioner's honest endeavor to comply with its legal obligations.

Although petitioner expects successfully to controvert any such allegation, it may ultimately be found that the reason for the *Wilja's* breakdown was a failure on the part of her owner to exercise due diligence with respect to seaworthiness of the vessel, and that consequently the respondent may be liable for damages because of the failure of the *Wilja* to reach Montreal and load her cargo prior to the closing of the St. Lawrence for the winter. However that may be, the question of whether the respondent was thereby guilty of a breach of contract is still clearly and undeniably a dispute "arising out of this contract" (R. p. 33) within the meaning of the arbitration clause.

See:

In re Canadian Gulf Line, Ltd. (The Soloy), 98 F. (2d) 711, 714.

In *Shanferoke Coal & Supply Corp.* v. *Westchester S. Corp.*, 70 F. (2d) 297 (C. C. A. 2), the Court said (p. 299):

> "Nor are we impressed with the notion that there was nothing to arbitrate. We may assume arguendo, though we do not mean so to decide, that if a party repudiates a contract in toto, he can neither insist on arbitration, nor compel the opposite party to do so. Jureidini v. National British Millers Ins. Co., (1915) A. C. 499; Aktieselskabet v. Rederiaktiebolaget Atlanten, (D. C.) 232 F. 403. Here, though the defendant failed to perform, that was not a repudiation, and the arbitration clause was for the very purpose of adjusting breaches. * * * If the clause is general in form, it makes no difference what may came up under it."

In affirming, this Court said (293 U. S. 449, at pp. 453-454):

> "THIRD. The plaintiff also contends that the defendant was not entitled to a stay because its answer raised no arbitrable issues; * * *. The reasons why these contentions are without merit are sufficiently stated in the opinion of the Court of Appeals."

The decision of the Circuit Court of Appeals in the case of *In re Utility Oil Corporation*, 69 F. (2d) 524, suggests that the *Atlanten* decision might have been otherwise had the case arisen subsequent to the enactment of the United States Arbitration Act.

It is undoubtedly true that the decision in the *Atlanten, supra,* would have been otherwise had the United States Arbitration Act been in effect, because this Act (Sec. 2) specifically extends the scope of arbitration agreements to controversies "arising out of the said contract *or the refusal to perform the whole or any part thereof.*"

In addition to the *Atlanten*, the Circuit Court of Appeals cites as authority two British cases. In the first case cited, *Jureidini* v. *The National British and Irish Millers Insurance Co., Ltd.*, [1915] A. C. 499, the House of Lords held that where an insurance company pleaded the invalidity of its policy, it could not plead in bar the failure of the assured to arbitrate where there was not a general arbitration clause in the policy, but merely a clause which provided ([1915] A. C. at p. 500): "XVII. If any difference arises as to the amount of any loss or damage, such difference shall, independently of all other questions, be referred to the decision of an arbitrator * * *." It would have been manifestly unjust to require the assured to go to the expense of arbitrating the limited question of the amount of his loss as a condition precedent to litigating with the company the question (admittedly not included within the arbitration clause) as to whether or not the company was liable at all.

The House of Lords, in the leading case of *A. Sanderson & Son* v. *Armour & Co., Ltd.*, 1922 Scotch Cases (House of Lords) 117, said in a situation where one party was refusing to proceed with a contract (p. 121): "The proposition that the mere allegation by one party of repudiation of the contract by the other deprives the latter of the right to take advantage of an arbitration clause, is unreasonable in itself, and there is no authority to support it." The *Sanderson* case was a Scotch appeal, but, as stated in the decision of the Privy Council in the case of *Champsey Bhara & Co.* v. *Jivraj Balloo Spinning and Weaving Co., Ltd.*, [1923] A. C. 480, at 489: "It was a Scotch case, but in no way depended upon any peculiarity of the law of Scotland."

In the case of *Macaura* v. *Northern Assurance Co., Ltd.*, [1925] A. C. 619, Lord Sumner, writing for the House of Lords, distinguished the *Jureidini* case, saying (p. 631):

> "It was held that the defendants could not both repudiate the contract in toto and require a performance of a part of it, which only became performable when liability was admitted or established. The pres-

> ent case is the converse. Here, an arbitration and award are conditions precedent to any action to enforce the policy. The defendants do not repudiate the policy or dispute its validity as a contract; on the contrary, they rely on it and say that according to its terms, express and implied, they are relieved from liability."

The situation referred to in the above quotation from the *Macaura* case is precisely the situation in the case at bar. The petitioner does not repudiate the charter-party or dispute its validity as a contract; on the contrary, it relies upon it and asserts that according to its terms, express and implied, it is relieved from liability.

As to the limited scope of the *Jureidini* case, see too:

> *Woodall* v. *Pearl Assurance Co., Ltd.,* [1919] 1 K. B. 593 (Court of Appeal).
> *Golding* v. *London and Edinburgh Insurance Co., Ltd.,* (1932) 43 Ll. L. Rep. 487.

The second British case cited by the Circuit Court of Appeals does not deal with the question of repudiation at all. In that case, *Hirji Mulji* v. *Cheong Yue Steamship Co., Ltd.,* [1926] A. C. 497, a charter-party of the steamship *Singaporean* had been entered into in November, 1916, pursuant to which the vessel was to be placed at the charterer's disposal in March, 1917. Prior to the time when the ship was to have been delivered to the charterer, she was requisitioned by the British Government. Two years later the requisition was lifted and the shipowner then requested the charterer to take delivery. The charterer declined on the ground that the charter had been frustrated by the requisition prior to the vessel being assigned to the charter. Thereupon the shipowner demanded arbitration and, upon the charterer's refusal to participate, proceeded to obtain an award in accordance with the provisions of the British Act.

The Court held that since the sole question for the arbitration was whether the charter had been frustrated, and since the dispute as to whether the vessel must be accepted by the charterer had arisen long after the alleged frustration, the arbitrator was without jurisdiction; but the Court was careful to point out that its decision referred only to disputes arising after the frustration. Lord Sumner, writing for the Privy Council, said (p. 503):

> "Accordingly, if it be the law that when a contract is frustrated it is brought forthwith to an end *as regards matters thereafter arising,* and if it was the fact that the contract had so come to an end before 1919, when for the first time an offer of the ship for service was effectively made, then the arbitrater could not clothe himself with jurisdiction by finding that there had been no frustration at all." (Italics ours.)

Obviously the instant case is distinguishable from the *Hirji Mulji* case in that here the question to be determined by the arbitrator is not whether the charter-party was frustrated, because indeed there can be no question but that it was, but whether by reason of events transpiring after the vessel had been assigned to the charter and before the frustration the shipowner is liable to the charterer in damages despite the frustration.

Aside from the fact that the *Hirji Mulji* case is distinguishable on the facts, it is to be gravely doubted whether the case was in fact correctly decided. In relieving a party of his obligations under a contract on the ground that it has been "frustrated", the Court is actually doing no more than reading into the contract an implied term which presumably the parties, had they given the matter thought, would have inserted. In other words, arbitrators, if they hold that the charter-party in the case at bar was frustrated because the Port of Montreal closed for the winter, are in reality doing no more than inserting into the charter-party by implication a provision that the vessel shall have to proceed to Montreal to load only if that port is not closed for the winter before she arrives.

In "The Law of Contract During and After War" (4th Ed., London, 1940), the learned author, W. F. Trotter, says (p. 130):

> "It has already been observed in the above discussion of impossibility of performance and frustration of adventure—two doctrines which are really one—that the true principle underlying them is the expressed or implied intention of the parties. * * * The principle is one of contract law. It depends on some condition expressed or to be implied in the contract itself, and not on something *dehors* the contract which ends the agreement."

In *Tamplin (F. A.) Steamship Company, Limited,* v. *Anglo-Mexican Petroleum Products Company, Limited,* [1916] 2 A. C. 397, Earl Loreburn said (pp. 403-404):

> "When our Courts have held innocent contracting parties absolved from further performance of their promises, it has been upon the ground that there was an implied term in the contract which entitled them to be absolved."

In the case of *In re Canadian Gulf Line, Ltd. (The Soloy)*, 98 F. (2d) 711, the Court, refusing to construe an arbitration agreement other than broadly, said (p. 714):

> "The disputes here arose out of a 'maritime transaction' and there was an agreement stated in the broadest terms to submit such disputes to arbitration. * * * Whether in any particular instance it (arbitration) is a desirable risk is not for us to say. It is a mode of procedure fostered by statute and in the present case invoked under the agreement of the parties. If they consent to submit their rights to a tribunal with extensive powers and subject to a most restricted review, they cannot expect the courts to relieve them from the effect of their deliberate choice."

LAST POINT

A writ of certiorari should be granted in order that this Court may review the decision of the United States Circuit Court of Appeals for the Second Circuit.

Respectfully submitted,

EDGAR R. KRAETZER,
Counsel for Petitioner.

HERBERT M. STATT,
JAMES MCKOWN, JR.,
of Counsel.